Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

OSCAR RUIZ DE CHAVEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether the testimony of two cooperating witnesses should have been suppressed under the "fruit of the poisonous tree" doctrine, as set forth in *United States v. Ceccolini*, 435 U.S. 268 (1978).

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner, Oscar Ruiz de Chavez, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINION BELOW

The court of appeals entered an unpublished memorandum decision that can be found at 2001 WL 1646865.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2001. A petition for rehearing and suggestion for rehearing *en banc* was denied on March 13, 2002. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

1. U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

[1] Petitioner's co-defendant, Sergio Molina-Montoya, is simultaneously filing a separate petition for a writ of *certiorari*. Mr. Ruiz de Chavez will refer to both defendants collectively as petitioners.

describing the place to be searched, and the persons or things to be seized.").

STATEMENT OF THE CASE

Petitioners are from El Centro, California. On December 5, 1998, they were stopped for a supposed traffic infraction while driving on Interstate 95 in South Carolina. After the stopping officer issued a warning, he repeatedly asked for permission to search the vehicle. The officer was hoping to discover drugs, money, or some type of contraband. The officer's requests for consent to search were repeatedly denied. Nevertheless, the officer eventually searched the trunk of petitioners' vehicle and found $469,000. Petitioners were arrested, and their personal effects, including telephone directories, were seized. Petitioners were later released, but the South Carolina officers provided federal officers in El Centro with the information that they obtained as a result of the search and seizure. Although petitioners were not under investigation before the South Carolina incident, the federal officers in El Centro, armed with this new information, began to build a case.

Included in the information provided to the El Centro officers by the South Carolina officers were phone numbers for Guillermo Alvarez and Jesus Moncada. At the time, federal officers in New York were investigating Alvarez for drug trafficking activity, while federal officers in Houston, Texas were investigating Moncada for drug trafficking and money laundering activity. Before the search and seizure in South Carolina, however, no federal

agents had any idea that these two individuals were connected to the petitioners.

In August of 1999, Alvarez and Moncada were arrested and indicted on federal charges carrying a minimum of ten years and a maximum of life in prison. In September of 1999, Alvarez agreed to cooperate with the government. Alvarez negotiated a plea agreement that would grant him substantial sentencing benefits in exchange for his cooperation. As part of his cooperation, Alvarez informed federal agents that two individuals from the El Centro area, nicknamed "Licensiado" and "Compadre," transported the proceeds of his drug trafficking activity in New York to Moncada in Houston. Alvarez did not know the names of these two individuals. However, federal agents already knew of the existence of petitioners due to the South Carolina incident. As a result, they showed Alvarez photographs of the petitioners. Alvarez was able to identify one of the petitioners from the photographs.

Like Alvarez, Moncada also agreed to cooperate with the government given the harsh penalties he faced. He also negotiated a plea agreement that would provide him with substantial sentencing benefits for his cooperation. Moncada confirmed that "Licensiado" and "Compadre" transported money for him and Alvarez. Moncada was also shown photographs of petitioners and identified them as "Licensiado" and "Compadre."

On December 21, 1999, a federal grand jury returned an indictment charging petitioners with conspiracy to distribute controlled substances in violation of 21 U.S.C.

§§ 841 and 846, and conspiracy to launder money in violation of 18 U.S.C. § 1956.[2] Petitioners filed a motion to suppress, contending that their Fourth Amendment rights were violated during the South Carolina incident. The district court agreed that their Fourth Amendment rights were violated and then sought to determine what evidence should be suppressed as a result of the violation. Petitioners contended that the testimony of Alvarez and Moncada should be suppressed as "fruit of the poisonous tree." The district court, however, disagreed and held that their testimony was admissible.

Petitioners then entered conditional pleas of guilty, preserving their right to appeal the district court's ruling regarding the admissibility of the cooperating defendants' testimony. Petitioners were each sentenced to thirty-seven months in custody and three years of supervised release. On appeal, the Ninth Circuit affirmed the district court's ruling, holding that "[t]he testimony of the cooperating defendants was sufficiently attenuated from the unlawful search to remove any taint. *United States v. Ceccolini*, 435 U.S. 268, 279-80 (1978)."

ARGUMENT

A compelling reason for granting a petition for a writ of *certiorari* exists when a United States court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court[,]" S. Ct. R. 10(c), and when it "has entered a decision in conflict with

[2] Thus, the district court asserted jurisdiction under 18 U.S.C. § 3231.

the decision of another United States court of appeals on the same important matter." S. Ct. R. 10(a). In this instance, the Ninth Circuit's unexplained application of this Court's decision in *Ceccolini* flatly conflicts with the very principles laid out in that decision. Indeed, the Ninth Circuit's misapplication of the *Ceccolini* test is demonstrated by the fact that the D.C. Circuit has reached a conflicting conclusion on very similar facts. *See United States v. Scios*, 590 F.2d 956 (D.C. Cir. 1978) (*en banc*). It is important that this Court resolve this conflict because it has not addressed the *Ceccolini* test for almost twenty-five years, and it has never applied the test in the context of cooperating witnesses, who now commonly testify in federal prosecutions.

A. The Ninth Circuit's Decision Conflicts With *Ceccolini*

In *Ceccolini*, 435 U.S. at 269-72, the Federal Bureau of Investigation ("FBI") conducted surveillance of Ceccolini's flower shop, suspecting that it could be involved in illegal gambling operations. Approximately one year later, after the surveillance had been discontinued, a local police officer stopped in the shop to visit his friend, Lois Hennessey, who worked there. *Id.* In the course of his visit, the officer noticed an envelope with money lying behind the counter. *Id.* He searched it and found not only money but policy slips. *Id.* He then asked Hennessey to whom the envelope belonged, and she replied that it belonged to Ceccolini and that he had asked her to give it to someone. *Id.* This information was then conveyed to the FBI. *Id.* Approximately four months later, the FBI interviewed Hennessey and she indicated that "she was studying police

science in college and would be willing to help" in the investigation of Ceccolini. *Id.* at 272.

The issue was whether Hennessey's testimony against Ceccolini constituted tainted "fruit" of the unconstitutional search of the envelope, thereby requiring suppression, or instead was admissible because it was sufficiently attenuated from the Fourth Amendment violation. This Court held that Hennessey's testimony was admissible and articulated several reasons for its conclusion: (1) her testimony "was an act of her own free will in no way coerced or even induced by official authority[;]" (2) the direct results of the constitutional violation were not used in questioning her; (3) there was a significant amount of time elapsing between the constitutional violation and the contact with Hennessey and the amount of time between the contact and her trial testimony; (4) her identity and her relationship to Ceccolini were known to investigators before the Fourth Amendment violation; and (5) the officer committing the constitutional violation did not do so with the intent of finding tangible or testimonial evidence. *Id.* at 279-80.

Despite the Ninth Circuit's decision, the five *Ceccolini* factors clearly weigh in favor of suppression in this instance. The first factor, whether the testimony was an act of free will, strongly weighs in favor of suppression, as the witnesses never would have come forward on their own and only agreed to testify to reduce their sentences. Put simply, the witnesses were "putative defendants," *id.* at 276, who had been arrested on serious drug trafficking charges and only agreed to testify pursuant to cooperation agreements which gave them an opportunity for substantial sentencing benefits.

The second factor, whether the direct results of the violation were used in questioning the witness, also weighs in favor of suppression, as the witnesses were shown photographs of petitioners that had been obtained as a direct result of the Fourth Amendment violation. The third factor, the time elapsing between the violation and the initial contact of the witness and between the contact and the trial testimony, cuts both ways; several months did elapse between the violation and the contact with the witnesses, but the contact was made during the pretrial litigation stage and shortly before the scheduled trial.

The fourth factor strongly weighs in favor of suppression because the agents had no idea that the witnesses had any relation to petitioners before the Fourth Amendment violation. Moreover, the government failed to show that petitioners' relationship with the two witnesses would have been discovered in the absence of the illegal stop. Finally, the fifth factor also weighs in favor of suppression because, unlike the officer in *Ceccolini*, the officer engaging in the unconstitutional conduct in this case was looking for incriminating evidence. Indeed, the misconduct committed in this case was rather egregious, as the offending officer would not accept a refusal to consent to search.

In sum, virtually all of the *Ceccolini* factors weigh in favor of suppression. The Ninth Circuit's unexplained conclusion to the contrary simply conflicts with this Court's opinion.

B. The Ninth Circuit's Decision Conflicts With The D.C. Circuit's Decision In *Scios*

The D.C. Circuit's *en banc* decision in *Scios*, 590 F.2d at 957-64, demonstrates that the Ninth Circuit's decision in this case conflicts with *Ceccolini*. In *Scios*, government agents violated the defendant's Fourth Amendment rights. *Id.* at 958. As a result, they obtained the name of a witness. *Id.* Approximately three months later, the government subpoenaed the witness to testify before a grand jury. *Id.* The witness was initially reluctant and only agreed to testify after he had been given immunity and ordered to testify or face contempt. *Id.* at 959. The D.C. Circuit held that the testimony was inadmissible under *Ceccolini*.

The D.C. Circuit noted that the only factor that weighed in favor of admission was the three-month delay between the violation and the contact with the witness, but explained that it was only "one of several factors to be considered" and that it was "far outweighed by the other considerations set forth in *Ceccolini*." *Id.* at 961 n.13. In particular, the D.C. Circuit emphasized that: (1) the witness only agreed to testify "in response to pressure by the prosecutor, including the threat of a contempt citation[;]" (2) the witness' relationship to the defendant was unknown prior to the violation; and (3) the officers who committed the violation did so in an effort to gain evidence. *Id.* at 963. This is precisely the situation in this case.

CONCLUSION

For the foregoing reasons, the Court should grant the instant petition for a writ of *certiorari*.

Respectfully submitted,

Dated: June 11, 2002

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SERGIO MOLINA-MONTOYA, Defendant-Appellant.	No. 00-50565 D.C. No. CR-99-03643-MLH MEMORANDUM*
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. OSCAR RUIZ DE CHAVEZ, aka, Licensiado, Defendant-Appellant.	No. 00-50586 D.C. No. CR-99-03643-H

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Argued and Submitted November 6, 2001
Pasadena, California

(Filed Dec. 20, 2001)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Before: SCHROEDER, Chief Judge, TROTT, and RAWLINSON, Circuit Judges.

Oscar Ruiz de Chavez and Sergio Molina-Montoya appeal the district court's denial of their motions to suppress the testimony of two cooperating defendants as "fruit of the poisonous tree."

The testimony of the cooperating defendants was sufficiently attenuated from the unlawful search to remove any taint. *United States v. Ceccolini*, 435 U.S. 268, 279-80 (1978). The district court properly denied the motions to suppress.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SERGIO MOLINA-MONTOYA, Defendant-Appellant.	No. 00-50565 D.C. No. CR-99-03643-MLH Southern District of California, San Diego ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Filed March 13, 2002)

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. OSCAR RUIZ DE CHAVEZ, aka, Licensiado, Defendant-Appellant.	No. 00-50586 D.C. No. CR-99-03643-H Southern District of California, San Diego

Before: SCHROEDER, Chief Judge, TROTT and RAWLINSON, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote.

The petition for rehearing filed on February 4, 2002 is DENIED, and the suggestion for rehearing en banc is rejected.